

O/324/20

TRADE MARKS ACT 1994

TRADE MARK APPLICATION No. 3200289

BY PEANUT APP LIMITED

AND

OPPOSITION No. 409071

BY PEANUTS WORLDWIDE LLC

Background and pleadings

1. This is an opposition by Peanuts Worldwide LLC (“the opponent”) to an application filed on 2nd December 2016 (“the relevant date”) by Peanut App Limited (“the applicant”) to register PEANUT as a trade mark.

2. The application originally covered a range of goods/services in classes 9, 38, 41, 42 and 45, including *computer application software for mobile phones and application software for social networking services via internet*. However, on the evening of 28th April 2020 (3 days before the hearing described below) the applicant filed a Form TM21B and limited the specification of the application to the following services in class 45:

“Social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services; providing information in the field of personal development, namely self-improvement, self-fulfillment, charitable, philanthropic, volunteer, public and community services, and humanitarian activities; babysitting services; information, advisory and consultancy services relating to all the aforesaid.”

3. The opponent is the proprietor of earlier EU trade mark 11628161, which consists of the word PEANUTS. The EU mark was applied-for on 5th March 2013 and registered on 12th September 2013. It covers a wide range of goods/services in classes 3, 4, 6, 8 -12,14 -18, 20, 21, 24 – 28, 32, 35 & 41, including *computer software* in class 9, *comic strips* in class 16 and *entertainment services* in class 41.

4. According to the notice of opposition:

- The contested mark is identical or similar to the earlier trade mark;

- The goods/services covered by the opposed application are identical or similar to all those covered by the earlier trade mark¹;
- The earlier trade mark has been used in the UK since 1955 and acquired a reputation for all the goods/services for which the earlier trade mark is registered;
- There is a likelihood of confusion on the part of the public, including the likelihood of association;
- Use of the contested mark would, without due cause, take unfair advantage of the earlier mark by increasing sales made under it;
- Use of the contested mark would, without due cause, be detrimental to the distinctive character of the earlier mark;
- Use of the contested mark in relation to goods/services of inferior quality would, without due cause, tarnish the reputation of the earlier mark;
- Use of the contested mark would be detrimental to the opponent's extensive licensing activities.

Consequently, the opponent claimed that the registration of the contested mark would be contrary to ss.5(1),(2) and/or (3) of the Trade Marks Act 1994 ("the Act").

5. The opponent further claimed that the earlier mark had been used throughout the UK since 1955 in relation to all the goods/services set out in Annex A to this decision. According to the opponent, it has acquired goodwill under the sign PEANUTS in relation to all these goods/services. And use of the contested mark in relation to the goods/services covered by the application would amount to a misrepresentation to the public, which would damage the opponent's goodwill. Therefore, use of the contested mark would constitute passing off, and registration of the mark would be contrary to s.5(4)(a) of the Act.

6. The opponent also initially relied on the status of the PEANUTS mark as a well-known trade mark protected under article 6bis of the Paris Convention. However, it now accepts that this adds nothing to the claims based on EU trade mark 11628161 and s.5(1),(2) or (3) of the Act.

¹ See Annex A

7. The parties subsequently used the 18 months cooling off period in an attempt to reach an amicable settlement. However, this did not prove possible. The applicant filed a counterstatement on 2nd November 2018 denying the grounds of opposition. I note that the applicant:

- Complained that the opponent had failed to particularise its claim that the respective goods/services are identical or similar;
- Denied that the earlier mark had a reputation or goodwill in the UK and put the opponent to proof of any such reputation/goodwill;
- Denied that the public would make a relevant link between the marks, or that the earlier mark has the requisite reputation or power of attraction for use of the contested mark to take unfair advantage of the earlier mark;
- Denied that there would be any detriment to the earlier mark, even if the public made a link between the marks.

8. Following the applicant's counterstatement the proceedings were stayed to give the parties a further opportunity to reach a settlement. Regrettably, this still was not possible.

Representation

9. The opponent was originally represented by Page, White & Farrer. This later changed to Maucher Jenkins. The applicant is represented by Osborne Clarke LLP. A hearing was held on 1st May 2020 via video conference. Angela Fox and Mark Webster appeared on behalf of the opponent. Chris Aikens appeared as counsel for the applicant.

Restriction and focussing of the parties' cases

10. Over the 3 days leading up the hearing, and at the hearing itself, the parties focussed their cases. I have already mentioned that the applicant restricted its application to services in class 45. The opponent also restricted its case as follows:

- The opponent's s.5(1)/5(2) case was re-focussed on the registration of the earlier mark in relation to *computer software* in class 9 and *entertainment services* in class 41;
- The reputation on which the opponent's s.5(3) case is based was said to cover "*at least*":

Class 9: Computer software (specifically computer application software for mobile phones); motion picture films featuring adult's and children's entertainment; downloadable motion pictures and television shows featuring adult's and children's entertainment; downloadable electronic games via the Internet and wireless devices; computer games software for use on computers, mobile phones and cellular phones; downloadable computer software; computer game software; video game software.

Class 14: Jewellery.

Class 16: Printed matter; stationery; posters; comic strips; comic books; note books; diaries; journals; stickers.

Class 18: Handbags.

Class 25: Clothing.

Class 41: Education; entertainment; continuing animated programs distributed over television, satellite, audio, video media, the Internet and worldwide web; providing computer games (software) via a computer network.

The evidence

11. The opponent's evidence-in-chief consists of a witness statement (with 29 exhibits) by Jonathan D Reichman. Mr Reichman is a partner at Hunton Andrews Kurth LLP, who, he says, handle trade mark matters on behalf of the opponent, i.e. he is the opponent's US lawyer. Mr Reichman says that the information in his statement comes from his own knowledge, or the records of his firm, or the sources he identifies, or has been conveyed to him by the opponent. His statement therefore

includes hearsay evidence. The main purpose of Mr Reichman's statement is to substantiate the opponent's reputation under PEANUTS.

12. The applicant's evidence consists of:

- (i) A witness statement (with 5 exhibits) by Michelle Kennedy, who is the CEO and founder of the applicant, and
- (ii) A witness statement (with 17 exhibits) by Richard May, who is a Chartered Trade Mark Attorney and Solicitor at Osborne Clarke LLP.

13. The main purpose of Ms Kennedy's evidence is to explain (1) why the applicant adopted the mark PEANUTS, and (2) how the applicant has traded under the mark since February 2017 (i.e. after the relevant date) by providing a mobile phone application through which women can access a social network and discuss issues such as fertility, pregnancy, motherhood and child-rearing.

14. Mr May's evidence appears to serve two purposes. Firstly, he provides evidence from websites and website analytics which appear to cast doubt on the weight that should be attached to some of Mr Reichman's evidence and/or supporting exhibits. Secondly, he provides evidence purporting to show third party use of PEANUT in the UK.

15. The opponent's evidence-in-reply, from Mr Mark Webster of Maucher Jenkins, largely seeks to answer Mr May's evidence.

16. I have read all the evidence. The summary of the evidence which follows sets out what I consider to be the most relevant parts of it.

Confidentiality

17. The opponent sought an order keeping certain parts of Mr Reichman's evidence confidential from public inspection. This was partly accepted and partly refused for the reasons given in my letter to the parties of 4th September 2019. The net result is that the following information is not open to the public:

- (i) The income generated from the opponent's UK website;
- (ii) The number of the opponent's worldwide licensees;
- (iii) The information provided in exhibit JR26 to Dr Reichman's witness statement from the opponent's social media analytics records, and the information obtained from social media analytics included in paragraphs 41, 42 and 43 of his witness statement.

The version of this decision which is open to public inspection takes account of these restrictions by redacting relevant information.

The evidence of Mr Reichman

18. According to Mr Reichman, the opponent owns the rights in the world-famous PEANUTS comic strip and its characters, Charlie Brown, Snoopy, Linus, Woodstock, Peppermint Patty and Lucy, collectively known as "*the PEANUTS gang.*"

19. The PEANUTS comic strip was created by American cartoonist Charles M. Schultz in the 1950s. By 1999, the comic strip had been syndicated in over 2600 newspapers worldwide with more than 350 million readers. According to a report on the BBC website in February 2000, the final PEANUTS comic strip was published on 13th February 2000, the same day that Mr Schultz passed away. By that time it had been translated into 21 languages and generated income of more than \$1bn. Mr Reichman says that "*The Peanuts comic strip has regularly appeared since [the 1950s] in major newspapers across the UK and other EU member states.*" He does not say which ones or when they last appeared. However, he provides the following information about the use of PEANUTS in the UK/EU:

- (i) A series of books was published in the UK under the PEANUTS mark, including 'For the Love of Peanuts' in 1967, 'Fun with Peanuts' in 1968', 'Meet the Peanuts Gang' in 1969 and 1971, 'Hey, Peanuts' and 'Peanuts for Everyone' in 1970, and 'The Peanuts Season' in 1974².

² Examples of the covers are in exhibit JR3

- (ii) A range of SNOOPY books were published in the UK between 2000-2002 under the PEANUTS mark³.
- (iii) More recently, in 2015, a series of books featuring Mr Schultz's comic strips were published in the UK under the title 'The Peanuts Guide to Life'. Another publication entitled 'Meet the Peanuts Gang' was also published in 2015 under the PEANUTS mark⁴. These publications are still available for sale.
- (iv) Between 2011 and the relevant date the opponent licensed 6 mobile phone apps. These were 'A Charlie Brown Christmas', 'My Charlie Brown Christmas Tree' (both 2011), 'It's The Great Pumpkin, Charlie Brown' (2012), 'A Charlie Brown Thanksgiving', 'Charlie Brown All Stars' (both 2013) and 'Peanuts: Snoopy's Town Tale' (2015). The screen icons for these apps appear to have featured the PEANUTS mark. The apps are aimed at children and their parents. Google Play lists them in the "*games, families and editor's choice*" categories. According to Mr Reichman, sales of these apps throughout the EU between 2011 and the relevant date generated over \$500k in royalties. The total royalties from UK sales of these apps between 2015 and May 2019 was around \$27k. The 2015 app appears to have been by far the most popular app. It was downloaded over 266k times in the UK in 2016.
- (v) In 2014, a short animation series was aired on French TV featuring the Peanuts Gang. 104 episodes were made under licence from the opponent.
- (vi) In 2015, a film entitled 'Snoopy and Charlie Brown: A Peanuts Movie' was released in the EU and worldwide. The release of the film was

³ See exhibit JR3

⁴ See exhibit JR4, page 5

widely reported in the UK media⁵. The revenue generated from the film in the EU, including the UK, was around \$740k.

- (vii) The opponent's website, peanuts.com, provides a link to the official PEANUTS shop, the UK version of which is at cafepress.co.uk. According to Mr Reichman, details of products sold on the opponent's UK website as at the date of his statement "*and prior to the relevant date*" are shown in exhibit JR5 to his statement. These products include calendars, mugs, t-shirts, pillow cases, clothing, phone cases, make up bags, shower curtains, bags, magnets and badges. I note that many of the products shown in the exhibit do not feature the PEANUTS mark, e.g. Snoopy t-shirts. However, some are described as PEANUTS goods, e.g. "*Peanuts T-shirts*" and "*Peanuts Shower Curtains*". Between 2015 and May 2019, the total revenue received from sales of all goods from the UK website amounted to [REDACTED].
- (viii) The opponent had at least 5 licensees in the UK at the relevant date. These were The Rodnick Band, Rolex, Peter Jensen, The Cambridge Satchel Company and Art You Grew Up With.
- (ix) The Rodnick Band is a UK "*fashion label*." Mr Reichman says that the opponent collaborated with this undertaking twice in 2014 to create collections known as 'RODNICK X PEANUTS'. Exhibit JR6 consists of nine pictures of clothing bearing characters from the Peanuts Gang, two of which have the marketing line described above superimposed over the pictures.
- (x) In 2014/15, the opponent and the Rodnick Band released a limited-edition watch with luxury watchmaker Rolex. The watch featured a Snoopy character on its face, but had the words 'Rodnick X Peanuts' on the back of the watch. Mr Reichman says that the watch went on sale at around £16.5k and was stocked by a retailer in London.

⁵ See exhibit JR22

- (xi) In 2014, the opponent licenced the PEANUTS trade mark to designer Peter Jensen. He produced a range of clothing called 'Peter Jensen X Peanuts'⁶. The collection was made available for sale at UK fashion retailer Browns.
- (xii) The opponent collaborated with The Cambridge Satchel Company, a high-end UK handbag manufacturer, to create a range of bags called The Cambridge Satchel Co Peanuts Collection. The bags featured characters from the Peanuts Gang comic strip. There is evidence that these bags were on sale in the UK in February 2015⁷.
- (xiii) The opponent is active on social media. On 30th November 2016 the opponent's Peanuts@Snoopy Twitter account had over 550k followers worldwide. At the same date the opponent's @Snoopy Facebook account has over 2m followers worldwide. The opponent also has an Instagram account called 'Snoopygrams' which features the PEANUTS mark in the heading of the page. At the same date, the Instagram account had around 1.7m followers worldwide.

20. For the sake of completeness and clarity I should make it clear what Mr Reichman's evidence does not contain. He gives no evidence about:

- (i) The number of books described in paragraph 19(1) – (iii) above sold in the UK, EU or elsewhere;
- (ii) The number of sales made under the PEANUTS mark by the opponent's licensees in relation to the products described in paragraph 19(viii) – (xii) above;
- (iii) The proportion of the followers of the social media accounts described in paragraph 19(xiii) above that are resident in the UK or EU;
- (iv) The amount spent by the opponent or its licensees promoting goods under the PEANUTS mark in the EU or UK prior to the relevant date, or at all.

⁶ See exhibit JR8

⁷ See exhibit JR9

Mr May's evidence

21. Mr May provides evidence about the way the media referenced the opponent's collaborations with The Rodnick Band, Rolex and Peter Jensen, as described in Mr Reichman's evidence. This part of Mr May's evidence appears to be intended to show that these products were not commonly referred to as 'PEANUTS' goods. He points out that (1) Vogue Magazine described the collaboration with The Rodnick Band as "*Snoopy's Fashion Comeback*"⁸, (2) A German fashion blog dubbed the Rolex watch as "*Snoopy's timepiece*"⁹, and (3) the clothing collection developed with Peter Jensen was called "*Lucy*" after one of the characters in the opponent's comic strip. The Telegraph dubbed this collection "*Snoopy style*"¹⁰.

22. Mr May also provides evidence about searches he conducted on Alexa.com, which is Amazon's global analytics company¹¹. He says that the evidence shows that 'peanuts' is the third most used keyword driving internet traffic to the opponent's website at peanuts.com ('Snoopy' and 'Charlie Brown' being first and second).

23. Mr May also points out that his research shows that around 79% of traffic to the website is from the USA.

24. Mr May conducted further research into third party users of PEANUT(S). He points out that:

- Ayun Halliday, Linas Alsenas and Rebecca Dotlich published books entitled PEANUT or PEANUT & PEARL (in the case of Ms Dotlich) in 2012 or 2007 and that these books are still available for sale¹²;
- Ickle Peanut Limited appears to have traded in the UK under ICKLE PEANUT in relation to infant clothing and accessories since 2013;
- Peanut & Piglet Limited appears to have traded in the UK under PEANUT & PIGLET in relation to infant clothing and accessories since 2014;

⁸ See exhibit RM1

⁹ See exhibit RM2

¹⁰ See exhibit RM3

¹¹ See exhibit RM5

¹² See exhibits RM8 – RM10

- The Bradford Exchange Limited appears to have traded in the UK under LITTLE PEANUT in relation to baby dolls since 2013.

Ms Kennedy's evidence

25. Ms Kennedy explains that the name PEANUT was chosen for the mobile phone application described in her evidence because 'peanut' is commonly used as a nickname or pet name for babies in the womb or new-born children. It was therefore thought to be a good allusive name for the app which would resonate with the applicant's target audience. She attaches some recent articles from UK websites showing that some mothers use 'Peanut' as a nickname for their unborn or newly born baby¹³.

Mr Webster's evidence-in-reply on behalf of the opponent

26. Mr Webster points out that Mr May's research on Alexa.com took place in November 2019 and, therefore, did not represent the position at the relevant date. The same applies to the analytics showing the proportion of USA visitors to the peanuts.com website.

27. In January 2020, Mr Webster conducted his own research on Alexa.com. This showed that:

- Despite being primarily known as a British comic, the highest proportion of traffic to the beano.com website in the prior 30 days (at around 34%) was from the USA;
- The highest proportion of traffic (at 25%) to the website of British TV channel Nickjr.co.uk¹⁴ is from the USA;
- Around 14% of the traffic to the UK website cartoonnetwork.co.uk is from the USA.

¹³ See exhibit MTK5

¹⁴ A joint venture between ViacomCBS and Sky

28. Mr Webster also provides evidence which shows that:

- The authors Ayun Halliday, Linas Alsenas and Rebecca Dotlich only published one book each with a title including the word PEANUT (i.e. they were not using PEANUT as a trade mark, as might have been the case if the mark has been used for a series of publications);
- Ickle Peanut Limited and Peanut & Piglet Limited are micro businesses, and only a small number of dolls have been sold under the name LITTLE PEANUT.

The section 5(4)(a) ground of opposition

29. I indicated at the hearing that I had decided to reject the opponent's grounds of opposition under ss.5(3) and 5(4)(a) of the Act. I will therefore start by giving my reasons for rejecting these grounds, starting with the s.5(4)(a) ground.

30. Section 5(4)(a) states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

31. In *Discount Outlet v Feel Good UK*¹⁵, Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

¹⁵ [2017] EWHC 1400 IPEC

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (Reckitt & Colman Product v Borden [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per Interflora Inc v Marks and Spencer Plc [2012] EWCA Civ 1501, [2013] FSR 21).”

32. In *Minimax GmbH & Co KG v Chubb Fire Limited*¹⁶, Floyd J. (as he then was) considered the evidence required to establish the existence of a relevant goodwill. He found that:

“The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

33. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*¹⁷, Lord Neuberger (with whom the rest of Supreme Court agreed) re-affirmed that the goodwill required to support a passing-off right depends on the existence of customers in the UK. It follows that it is not enough to show that, at the relevant date, the opponent's sign had a reputation of some sort in the UK. Rather, it is necessary for the opponent to show that it had customers in the UK to whom PEANUTS distinguished the goods or services provided, licensed or endorsed, by the opponent. Further, the opponent's UK goodwill must have been more-than-trivial in extent at the relevant date to have been protected under the law of passing off¹⁸.

¹⁶ [2008] EWHC 1960 (Pat)

¹⁷ [2015] UKSC 31 at paragraph 47 of the judgment

¹⁸ *Hart v Relentless Records* [2002] EWHC 1984 (Ch)

Goodwill

34. According to the Notice of Opposition, the opponent's goodwill under PEANUTS extends to all the goods/services set out in Annex A below. The opponent's skeleton argument took a more realistic view of the matter. The relevant part stated that:

"It is clear that the Opponent has built up a substantial goodwill over the years in PEANUTS in the UK, through the publication and syndication of the PEANUTS comic strips and related books, as well as through the broadcasting and distribution of films and animated television series, and through a long-established and comprehensive program of licensing which has seen PEANUTS in use in the UK for clothing, watches, bags, mobile digital applications, calendars, mugs, t-shirts and other clothing, pillow cases, phone cases, make up bags, shower curtains, magnets and badges and other merchandise. The average consumer in the UK has come to know and recognise PEANUTS as denoting a wide range of merchandise and services of, or sold under license or authorisation by, the Opponent."

35. The applicant's position is that, taken at its highest, the opponent's evidence establishes the reputation of PEANUTS only as the name of a comic strip produced between the 1950s and the author's death in 2000, which has been maintained or revived by the limited sale of books, merchandise and ancillary products. The applicant disputes that the reputation of PEANUTS extends to mobile phone applications, or to any other goods/services, at least independently of the reputation of the comic strip.

36. I accept that PEANUTS was distinctive of the comic strip during the period of publication, and that it remained distinctive of that comic strip at the relevant date. I also accept that a sufficient number of UK customers of publications would have been moved to buy those publications wholly or partly by the inclusion of the PEANUTS comic strip. The opponent, or its predecessor, would therefore have had UK 'customers' in the sense required to support a passing off action against anyone else publishing a PEANUTS comic strip. Despite the passage of time, that residual goodwill clearly continued at the relevant date, partly because the books, mobile

phone applications and merchandise, as well as the film released in 2015, served to keep the PEANUTS comic strip and its characters in the public eye. The opponent's UK goodwill in its comic strip at the relevant date was therefore substantial.

However, the evidence does not show that it was as overwhelming as the opponent asserts and appears to believe.

37. As to the other goods/services which the opponent claims are covered by its goodwill under PEANUTS, I note that the opponent takes issue with the applicant's reliance on the existence of three books by Ayun Halliday, Linas Alsenas and Rebecca Dotlich entitled PEANUT or PEANUT & PEARL. This is because these were titles of one-off books. The opponent says that PEANUT was, therefore, used to distinguish the literary works in question, but not as a trade mark identifying the trade source of the books¹⁹. The same criticism can be levied at the opponent's reliance on the title 'Snoopy and Charlie Brown: A Peanuts Movie', which was a one-off film. I do not, therefore, consider the evidence shows that the opponent's goodwill at the relevant date extended to films. If I am wrong about that then, considering that PEANUTS was only used as part of the title of one apparently moderately successful film, it could only have been weakly distinctive of films.

38. Only the last of the six mobile phone apps relied on by the opponent had a title that included the word PEANUTS: 'Peanuts: Snoopy's Town Tale'. It is true that the word PEANUTS appeared on the screen icon used for all the apps. There is no evidence that this icon would have been visible before the app was downloaded. The opponent therefore appears to have relied on the titles of these apps, all of which included the names of its comic strip characters, such Charlie Brown and Snoopy, to ensure that PEANUTS was recognised as distinctive of its goodwill. Taken at its highest, this evidence shows that the opponent's goodwill under PEANUTS extended to mobile phone apps providing games and amusement. The evidence does not show that PEANUTS was distinctive at the relevant date of mobile phone applications *per se*.

¹⁹ See paragraph 8-128 of *The Law of Passing-Off: Unfair Competition by Misrepresentation* 5th Ed.

39. The PEANUTS mark was used in 2015 in relation to books entitled 'The Peanuts Guide to Life' and 'Meet the Peanuts Gang'. There is no evidence about the scale of UK sales of these books, or about how they were promoted in the UK. I accept that the opponent's goodwill under PEANUTS extended to books. I do not, however, accept that this evidence, whether taken alone or together with the evidence of historical sales of PEANUTS books between 1967 and 2002, shows that, at the relevant date, PEANUTS was highly distinctive of books.

40. The use of PEANUTS in relation to clothing and other merchandise was essentially character merchandising of the kind described in *Hearst Holdings Inc. v AVELA and Others*²⁰. However, unlike BETTY BOOP, the word PEANUTS is an everyday dictionary word. It is the sort of word that the public would not be surprised to see used by different traders in relation to different categories of goods/services. The scale of the opponent's licensed use of, and sales under, PEANUTS in the UK in relation to merchandise appears limited in extent. I accept that the opponent's goodwill extended to clothing, handbags, and watches. I do not, however, accept that the evidence of the opponent's licensing activity, whether taken alone or together with the evidence of modest UK sales of merchandise via the opponent's website, show that, at the relevant date, PEANUTS was highly distinctive of these goods, or any other merchandise.

41. In my view, the evidence does not establish that PEANUTS alone was strongly distinctive of any of the goods/services relied on by the opponent, other than comic strips. This is partly because of the nature of the use of PEANUTS in relation to books, mobile phone applications, the 2015 film and the opponent's merchandise. These goods were intrinsically linked to the reputation of the comic strip and/or its characters. And partly because the extent of the authorised use of PEANUTS in the UK prior to the relevant date is modest, or is unclear.

²⁰ [2014] EWHC 439 (Ch)

Misrepresentation

42. Halsbury's Laws of England Vol. 97A (2012 reissue) provides guidance with regard to establishing the likelihood of deception. In paragraph 309 it is noted (with footnotes omitted) that:

"In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances."

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

43. The closest point of similarity between the respective goods/services appears to be the applicant's *online social networking services accessible by means of downloadable mobile applications* and the opponent's licensing of six mobile phone applications that were made available in the UK.

44. In my view, *online social networking services* means the provision of a social network for use by customers online. The purpose of such a network is to allow users to find and engage with people with similar interests. The mere fact that the applicant's services are accessible via a mobile phone app does not mean that the applicant's specification therefore covers services in the same field of activity as the opponent. After all, the opponent's mobile phone apps are nothing to do with providing access to social networks. Rather, they are for games and/or amusement. In my view, the services specified in class 45 are in a different field of activity to the goods covered by the opponent's goodwill.

45. In *Harrods Limited v Harrodian School Limited*²¹ Millet L.J. made the following points about the absence of a requirement for the parties to operate in a common field of activity, but also about the additional burden of establishing misrepresentation and damage when they do not:

"Where there is no or only a tenuous degree of overlap between the parties' respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In Stringfellow v. McCain Foods (G.B.) Ltd. [1984] R.P.C. 501 Slade L.J. said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that

'even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.'"

46. I accept that the marks PEANUTS and PEANUT are very similar.

²¹ [1996] RPC 697 (CA),

47. I also accept that the relevant public for the applicant's specified services overlaps with the relevant public for the opponent's actual services, i.e. the general public.

48. However, in my judgement, the specific nature of the opponent's goodwill, which is closely tied to the comic strip and its characters, the limited evidence of goodwill in relation to goods other than comic strips, and the differences in the fields of activity, mean that the opponent has not come close to establishing that the applicant's use of PEANUT in relation to the specified services in class 45 would have amounted to passing off at the relevant date. This is why the s.5(4)(a)-based ground of opposition fails.

The section 5(3) ground of opposition

49. Section 5(3) states:

“(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

50. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Addidas-Salomon*, Case C-487/07, *L'Oreal v Bellure*, Case C-323/09, *Marks and Spencer v Interflora* and Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

Reputation

51. As noted earlier, the opponent claims that earlier EU trade mark 11628161 – PEANUTS - has a reputation for (at least) the following goods/services:

Class 9: Computer software (specifically computer application software for mobile phones); motion picture films featuring adult's and children's entertainment; downloadable motion pictures and television shows featuring adult's and children's entertainment; downloadable electronic games via the Internet and wireless devices; computer games software for use on computers, mobile phones and cellular phones; downloadable computer software; computer game software; video game software.

Class 14: Jewellery.

Class 16: Printed matter; stationery; posters; comic strips; comic books; note books; diaries; journals; stickers.

Class 18: Handbags.

Class 25: Clothing.

Class 41: Education; entertainment; continuing animated programs distributed over television, satellite, audio, video media, the Internet and worldwide web; providing computer games (software) via a computer network.

52. The applicant denies that the opponent's evidence establishes that the earlier EU mark has a reputation, except possibly in relation to comic strips.

53. As the earlier trade mark is registered in the EU, the reputation must be established in the EU. However, a reputation in the UK usually constitutes a reputation in the EU too²².

54. In *General Motors* the CJEU stated that in assessing whether the earlier is known by a significant part of that relevant public:

“27.the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

55. The Peanuts comic strip appears to have been published over a long period of time until the death of the author in 2000. The comic strip was published in the EU, although it is not clear exactly how many EU countries it was published in. Further, there is no specific evidence about the share of the EU market for comic strips, or for any other goods/services, held by the mark at any date. Nor is there any evidence as to the amount spent promoting the mark in the EU.

56. My attention was drawn to a copy of an article published on the BBC's website in February 2000 under the title *“Peanuts consigned to history”*, which described PEANUTS as the world's most famous comic strip. I have taken this and other similar references into account. I have also taken into account that the article in

²² *Pago International GmbH v Tirolmilch registrierte GmbH*, CJEU Case C-301/07

question was published in 2000, whereas the relevant date for assessing the reputation of the EU mark is 16 years later. In any event, even when made (or repeated) by third parties, such claims to fame are no substitute for basic factual evidence. It is true that the popularity of the PEANUTS comic strip would have been maintained, to some extent, by the PEANUTS books, mobile phone applications and the 2015 film. However, even in the case of the film, the revenue generated in the EU, including the UK, was only around \$740k. That does not appear to be a large sum when considered in the context of film venue generated across the EU.

57. I have also taken account of the animation series broadcast in France in 2014, which would undoubtedly have served to popularise and maintain the reputation of the comic strip in that territory.

58. I have also taken into account the evidence of the opponent's social media presence and following. This does not show that PEANUTS has a vast following on social media in the EU.

59. Taking all the above into account, I find that PEANUTS retained a substantial, but not overwhelming, reputation for comic strips in the EU at the relevant date.

60. For the reasons given above in relation to the passing-off right claim, I find that the opponent has not established that the earlier EU trade mark had a qualifying reputation at the relevant date in relation to any other goods/services. That is to say that PEANUTS was not known by a significant part of the relevant UK or EU public as a trade mark for anything other than comic strips.

Link

61. As I noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

The degree of similarity between the conflicting marks

62. The opponent says that the marks are identical because the absence of the letter 'S' from the applicant's mark is likely to be overlooked by average consumers, who are accustomed to seeing the same word presented in the singular and plural. The applicant submits that the difference is significant because it makes a visual and aural difference to the marks, and because PEANUT (singular) and PEANUTS (plural) have different meanings. According to the applicant, PEANUT describes a type of nut or an affectionate name for an unborn or newly born baby, whereas PEANUTS describes either a number of nuts or a small amount of money.

63. I do not consider that the average consumer would regard the conceptual difference between a single peanut and number of peanuts as a material difference. Although there is some evidence of PEANUT being used as an affectionate name for an unborn or newly born baby, I do not consider that this meaning would strike the consumer outside the context of pregnancy and babies. I do not therefore accept that this is a material distinction between the marks, except possibly in the context of the applicant's *babysitting* services. I accept that 'peanuts' is commonly used as a slang term for a small amount of money. However, in the context of the applicant's services, I don't consider that this meaning will leap out at consumers either. I conclude that the marks have the same, or virtually the same, meaning, i.e. a type of nut. However, I do not accept that average consumers are liable to completely miss the difference between the singular and plural forms of the word PEANUT. I therefore find that the marks are highly similar rather than identical.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

64. Comic strips are goods. I see no similarity between these goods and the applicant's services in class 45.

The strength of the earlier mark's reputation

65. The earlier EU mark retained a substantial, but not overwhelming, reputation for comic strips at the relevant date, and this reputation extended to the UK.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

66. The earlier mark is inherently distinctive to a medium degree, but had become highly distinctive through use in relation to comic strips.

Whether there is a likelihood of confusion

67. Given the distance between, on the one hand, comic strips and, on the other, the contested services in class 45, I see no likelihood of confusion on the part of the public, including the likelihood of association (in the sense of indirect confusion).

68. Taking account of all of the above, I find that the relevant public for the parties' goods and services will not make any link between the marks. If I am right about this then the possibility of the contested mark taking unfair advantage of the earlier mark, or causing detriment to it, does not arise. However, in case I am wrong, I will briefly consider the opponent's case under these headings. This necessarily requires me to assume, contrary to my primary findings, that the relevant public will make a mental link between the marks.

Unfair advantage

69. The opponent's pleaded case is that the positive image associated with its comic strip and licensed goods will transfer to the contested mark and permit it to gain more sales than would otherwise be the case. In my view, the opponent has an exaggerated view of the scale of the reputation of PEANUTS in the UK. At the relevant date, the mark had a substantial reputation in a fairly narrow context (i.e. a comic strip and its characters), not the all-pervasive reputation the opponent appears to believe. Accordingly, even if the contested mark caused a section of the UK public

to think about the opponent's earlier mark, any such link would be fleeting, not strong. Further, the different nature of the services covered by the application, compared to comic strips, makes it unlikely that any such link would be enough to change consumers' economic behaviour in favour of the applicant.

70. At the hearing, the opponent's representative added a slightly different, albeit related point; namely, that the applicant's services in class 45 are a natural progression of the opponent's licensing activity in relation to its comic strip. I do not accept this. The evidence, such as it is, shows only modest licensing in relation to related goods, such as books/films/mobile phone apps, and merchandising in the sorts of goods that lend themselves to such activity, such as clothing, bags and watches. I see no evidential basis for the submission that the applicant's services are in any way a natural progression in trade for a trade mark with a reputation for comic strips.

71. I would therefore have rejected this part of the opponent's case, even if I had found that there the relevant public would make a mental link between the marks.

Detriment to reputation

72. The opponent's case is that it would have no control over the applicant's use of the contested mark. Therefore, any negativity generated by such use would tarnish the reputation of PEANUTS. It was suggested at the hearing that some aspects of social networking activity are controversial and could lead to such a damaging association. There is no evidence of this. I see nothing about the inherent nature of the services covered by the application that would make use of a very similar trade mark for those services damaging to the reputation of the opponent's PEANUTS trade mark for comic strips. It is well established that the mere theoretical possibility of the later mark being used in ways that could rebound negatively on the reputation of an earlier mark is not sufficient to found an opposition under s.5(3)²³. Therefore, I would have rejected this part of the opponent's case too.

²³ See *Unite The Union v The Unite Group Plc*, Case BL O/219/13, Ms Anna Carboni as the Appointed Person, at paragraph 46 of the judgment

Detriment to distinctive character

73. The opponent's case is that the applicant's use of the contested mark will erode the distinctive character of the earlier trade mark. According to the opponent, there is a serious likelihood that this will lead to a change in the economic behaviour of average consumers. The relevant public in this context are consumers of comic strips. I see no credible basis for the claim that use of the contested mark in relation to the services in class 45 is likely to affect the economic behaviour of consumers, or potential consumers, of PEANUTS for comic strips. Therefore, I would also have rejected this part of the opponent's case.

The section 5(1) and (2) grounds of opposition

74. For the reasons given in paragraph 63 above, I find that PEANUTS and PEANUT are not identical. The s.5(1) ground of opposition cannot, therefore, succeed.

75. Section 5(2) of the Act is as follows:

"5(2) A trade mark shall not be registered if because-

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the trade mark is protected...there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

The notional nature of the assessment

76. The opponent's earlier EU trade mark is not subject to proof of use. Therefore, unlike the assessment required under ss.5(3) and 5(4)(a), which depend to varying degrees on the actual use of the earlier mark, the assessment required under s.5(2)

requires me to assume use of the earlier mark in relation to all the goods/services for which it is registered. As Kitchen L.J. (as he then was) explained in *Roger Maier and Another v ASOS*²⁴:

“78.the court must.... consider a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered. Of course it may have become more distinctive as a result of the use which has been made of it. If so, that is a matter to be taken into account for, as the Court of Justice reiterated in Canon at paragraph [18], the more distinctive the earlier mark, the greater the risk of confusion. But it may not have been used at all, or it may only have been used in relation to some of the goods or services falling within the specification, and such use may have been on a small scale. In such a case the proprietor is still entitled to protection against the use of a similar sign in relation to similar goods if the use is such as to give rise to a likelihood of confusion.”

Identity and similarity of the goods/services

76. The opponent relies on the registration of the earlier EU trade mark in relation to *computer software* in class 9 and *entertainment services* in class 41.

77. According to the opponent, *computer software* is complementary, and therefore similar, to the following services in the application:

“Social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services.”

78. The opponent drew my attention to three decisions of the Opposition Division of the EUIPO, and one decision of the Cancellation Division²⁵, all of which found that

²⁴ [2015] EWCA Civ 220

²⁵ See *Digi Media Ltd v DMG Media Ltd*, Opposition B2317447, *Universal International Music B.V. v Artistic Island S.L.* Opposition B3058975, *Cuardernello S.L. v Magalhaes*, Opposition B3045344 and

computer software is complementary and similar to *online social networking services*, and one of which found that *computer software* is also similar to *social introductions online*. The clearest reasoning for the EUIPO's decisions can be found in the decision of the Cancellation Division in Case 13849C. The panel observed that *computer software* includes mobile [software] applications. They went on to find that it is common for *online social networking services* to be provided through such mobile applications, and for the mobile application to be marketed by the same undertaking that provides the services. The Cancellation Division therefore reasoned that although the respective goods/services are different in nature, they have the same general purpose and target the same public through the same distribution channels.

79. The opponent submits that computer software is also similar to the other services covered by the application, that is to say:

“Providing information in the field of personal development, namely self-improvement, self-fulfillment, charitable, philanthropic, volunteer, public and community services, and humanitarian activities; babysitting services; information, advisory and consultancy services relating to all the aforesaid.”

This is because all of these services can be offered to the public via software apps. Further, the services may be offered online and, therefore, through the same distribution channels as downloadable software apps.

80. For its part, the applicant drew my attention to the judgment of the Court of First Instance of the European Communities in *Commercy AG v OHIM*²⁶ in which the court upheld the decision of Second Board of Appeal who found that, inter alia, *computer software for the production of platform-independent internet shops and internet authoring systems chiefly for the reservation, booking and payment of accommodation* was not complementary or otherwise similar to, inter alia, *travel reservation and travel booking services provided by means of the world wide web* in

Snapfy Teknoloji Sanayi Ve Ticaret Ananim Sirketi v an individual based in Sweden, Cancellation C13849

²⁶ Case T-316/07

class 39 and *computerised hotel reservation services* in class 42. The relevant part of the court's decision is set out below.

“51. [The Board of Appeal’s] findings must be upheld. They show, to the requisite legal standard, that the goods and services concerned differ in respect of their nature, intended purpose and method of use and are neither in competition with each other nor complementary. First of all, the relevant goods and services covered by the earlier trade mark are computer-related whereas the information, booking and reservation services covered by the mark at issue are different and use computer technology only to support the transmission of information or to make it possible to reserve hotel accommodation or travel.

52. Further, the relevant goods and services covered by the earlier trade mark are especially intended for businesses in the hotel and travel sector, and the information, booking and reservation services covered by the trade mark at issue are intended for the public at large.

53. In addition, the relevant goods and services covered by the earlier mark are used to enable a software system, and, more specifically, an internet shop, to function, whereas the information, booking and reservation services covered by the trade mark at issue are used to reserve hotel accommodation or travel.

54. The mere fact that the information, booking and reservation services covered by the trade mark at issue are exclusively provided via the internet and therefore require software support such as that provided by the goods and services covered by the earlier trade mark does not suffice to remove the essential differences between the goods and services concerned in terms of their nature, their intended purpose and their method of use.

55. Computer goods and computer services are used in nearly all sectors. Often, the same goods or services – for example, a certain type of software or operating system – may be used for very different purposes, and that does

not mean that they become different or distinct goods or services. Conversely, travel agency services do not become something else – in terms of their nature, intended purpose or method of use – solely because they are provided via the internet, particularly since, nowadays, use of computer applications for the provision of such services is almost essential, even where those services are not provided by an internet shop.

56. Moreover, the goods and services concerned are not substitutable, since they are intended for different publics. Therefore, the Board of Appeal was right to find that those goods and services are not in competition with each other.

57. Finally, those same goods and services are also not complementary. It must be recalled in this respect that goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60; judgment of 15 March 2006 in Case T-31/04 Eurodrive Services and Distribution v OHIM – Gómez Frías (euroMASTER), not published in the ECR, paragraph 35; and Case T-420/03 El Corte Inglés v OHIM – Abril Sánchez and Ricote Saugar (Boomerang TV) [2008] ECR I-0000, paragraph 98).

58. That case-law definition implies that complementary goods or services can be used together, which presupposes that they are intended for the same public. It follows that there can be no complementary connection between, on the one hand, the goods and services which are necessary for the running of a commercial undertaking and, on the other, the goods and services produced or supplied by that undertaking. Those two categories of goods or services are not used together since those in the first category are used by the relevant undertaking itself whilst those in the second are used by customers of that undertaking.”

81. According to the applicant, this decision shows that the mere fact that computer software is used to provide a service does not mean that *computer software* is similar to, for example, *online social networking services*. Further, as the Court of First Instance is a superior court to the Opposition and Cancellation Divisions of the EUIPO, its decisions should be given more weight.

82. The applicant also points out that computer software is not substitutable for the applicant's services, and that although the distribution channels for computer software will vary greatly, depending on the type of software and its purpose, they will generally be different to the distribution channels for social networking services.

83. Although both parties urged me to regard their authorities as persuasive, neither suggested I was bound by decisions of the EUIPO or the Court of First Instance, on which they relied. This is correct. Decisions about the similarity of specific goods/services are ultimately findings of fact. Therefore, such decisions, even when made by the Court of First Instance of the EC (now General Court of the EU), are not binding on the registrar.

84. In *Sky v Skykick*²⁷, Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

"...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

²⁷ [2020] EWHC 990 (Ch)

(3) *An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.*

(4) *A term which cannot be interpreted is to be disregarded.”*

I will keep these points in mind.

85. I find that *downloadable mobile applications* covers downloadable software for mobile hardware devices, such as a mobile phone. Therefore, the opponent's registration of PEANUTS for *computer software* clearly covers *downloadable mobile applications*. Further, as the purpose of the opponent's *computer software* is not specified in the specification of the earlier trade mark, it covers *downloadable mobile applications* for any purpose, including providing access to online social networks .

86. In the judgment of the Court of Justice of the European Union in *Canon*²⁸ the court stated that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

I accept that the mere fact that *online social networking services accessible by means of downloadable mobile applications* requires the use of downloadable software does not mean that the services are similar to *computer software*.

87. However, as well as covering the sort of software the opponent actually licenses under PEANUTS (i.e. downloadable mobile applications for playing games and/or amusement), the term *computer software* also covers the sort of downloadable mobile applications provided by the applicant in connection with its social networking

²⁸ Case C-39/97 at paragraph 23 of the judgment

services (and many other types of software besides). In this event, the users of the goods and services will coincide. It also seems likely that the distribution channels will be the same. I accept that software is different in nature to services. However, given the interrelated uses of downloadable mobile software applications for accessing online social networking services and *online social networking services accessible by means of downloadable mobile applications*, I find that there is some overlap in the ultimate purposes of the respective goods/services, which is to enable users to find and engage with people with similar interests.

88. At the hearing, the applicant's counsel argued that although mobile software applications may be important for the use of the applicant's services, the goods/services are not complementary in the sense specified in the case-law. According to Mr Aikens, this was because the mobile application under consideration is merely a tool for accessing the services, which he likened to web browser software used to access internet services. In my view, the applicant's own evidence indicates that the software and services under consideration are much more closely connected than web browser software and services accessed from websites found on the internet. Ms Kennedy describes her business like this:

"Our PEANUT app was launched in the UK in February 2017. It is a private and ad-free social network..."

Users of the PEANUT app must create an account on the app through logging in with facial recognition to ensure that only women join. Any women below the age of 18 are not permitted to join. Currently, we have over one million women using the app."

89. Ms Kennedy's description of the software app as being a key part of her business is consistent with the applicant's trade mark application originally covering, amongst other things, *application software for social networking services via internet* in class 9.

90. According to Ms Kennedy, users download the PEANUT app from the Apple app

store. It is the only way to access the applicant's services. The method of use of the goods/services therefore appears to be capable of being the same, i.e. using an app. This does not mean that a software app is "*indispensable*" for the use of online social network services. However, it does show that a particular kind of downloadable mobile application is, at the least, important for the use of social networking services. It also shows that such apps may be provided by the same undertakings that provide online social networking services. I therefore find that *computer software covers application software for social networking services via the internet* and is complementary, and similar to a medium degree, to *online social networking services accessible by means of downloadable mobile applications*.

91. I find that *social introduction and networking services; online social networking services; personal introduction services by computer; Internet based personal introduction services* either cover, or are subsets of, or are closely related to, *online social networking services accessible by means of downloadable mobile applications*. They are, therefore, also similar to a medium degree to *computer software*.

92. I find that "*providing information in the field of personal development, namely self-improvement, self-fulfillment, charitable, philanthropic, volunteer, public and community services, and humanitarian activities; information, advisory and consultancy services relating to all the aforesaid*" are services through which the party responsible for the services provides information, advice or consultancy to the users of the service. This is different to social networking services, which are about enabling users to find and engage with (and possibly obtain information from) other users with similar interests. The opponent says that the services under consideration can also be offered to the public via software apps. There is no evidence of this. Further, even if such software apps are available, there is no evidence that the public expect the same undertaking to provide both the apps and the services. I do not, therefore, accept that these are complementary goods/services. If such downloadable apps are available, then the distribution channels for the respective goods/services may overlap (i.e. the internet), as may the users (i.e. the general public). I do not regard such high-level overlaps as sufficient, by themselves, to

establish any material similarity between *computer software* and the *information, advisory and consultancy services* under consideration.

93. The opponent argues that *babysitting services* are also similar to *computer software* because babysitters can be booked via downloadable apps. Again, there is no evidence of this. In any event, merely showing that software can be used to obtain a service does not establish that they are similar. The opponent has not shown that there is a close connection between *computer software* and *babysitting services* or, more importantly, that the public expect the same undertaking to provide such goods/services. The respective goods are different in nature and purpose. I do not, therefore, accept that these are complementary goods/services, or that they are similar on any other basis.

94. The opponent claims that the following services are also similar to *entertainment services*, which are covered by EU trade mark 11628161.

“Social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services.”

95. According to the opponent, the respective services target the same public, share the same distribution channels and are provided by the same undertakings. In support of this submission, the opponent points out that well-known social media platforms, such as Facebook and Twitter are used for social networking and to provide entertainment. There is no evidence of this. Further, in my experience, any entertainment available on these platforms is posted by users of the platforms, not by the providers of the social network. This argument does not, therefore, support the opponent's case.

96. My attention was drawn to a decision of the EUIPO's Opposition Division in Case B2747650, *Sky Plc v SZ DJI Technology Co., Ltd*, in which it was found that *social networking* and *dating services* are similar to *entertainment services*. According to the Opposition Division, *entertainment services* is a broad term covering a range of

services for the amusement or diversion of consumers. Such services are, therefore, similar in their ultimate purpose to *networking* and *dating* services because “*all of these aim at ameliorating the emotional status of people and amusing them.*”

Further, the respective services are offered through the same spaces (clubs and/or the internet) and target the same users. The Opposition Division observed that many undertakings operating in the entertainment field also have branches focusing on dating and similar services.

97. I have no personal knowledge about such market convergence between businesses providing entertainment and dating services. There is no evidence of such a trend before me. The opponent has not established that the same undertakings are known to provide entertainment and dating services. I accept that the respective services could be offered through the same spaces, physical or online, but I do not attach much weight to this. The same could be said of many different services. I also accept that the public for the services overlap. However, as both services are aimed at the general public, I do not consider that much weight should be attached to this either. I do not agree that the ultimate purpose of the services is the same. In my view, the purpose of dating and/or social introduction services is to allow users to find and engage with people with similar interests. This is different to entertainment services, through which the responsible undertaking itself offers services for its users to enjoy. I therefore find insufficient points of similarity between the respective services to justify a finding that they are similar. If I am wrong about that, then they are similar to only a low degree. On either footing, any similarity that may exist between services specified in paragraph 94 and *entertainment* services does not assist the opponent’s s.5(2) case. This is because any similarity that may exist between them is likely to be less than the degree of similarity I have accepted exists between the same services and *computer software*.

Global assessment of the likelihood of confusion

98. Having found that some of the services covered by the application are similar to *computer software*, it is necessary to conduct a global assessment of the likelihood of confusion. The following principles are gleaned from the decisions of the EU

courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive

role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Average consumer and the selection process

99. The services covered by the application are aimed at the general public. The parties appear to agree that the services will usually be selected from websites or advertisements and, therefore, primarily selected through visual means.

100. The applicant submits that because they require the provision of personal information, the services covered by the application will be selected with an above average degree of attention. The opponent disputes this. In this connection, the opponent points out that all social media accounts require the provision of a certain amount of personal data, and yet the public show no reluctance to set up social media accounts.

101. I accept the opponent's submission. However, I find that users of *babysitting* services will exercise a high degree of care when selecting a service provider. This is not because of their reluctance to provide personal data, but because of the critical importance of identifying a responsible and suitable carer for their children. The remainder of the services covered by the application will be selected with an average or 'normal' degree of attention.

Distinctive character of the earlier trade mark

102. In *Lloyd Schuhfabrik Meyer & Co* the CJEU stated that:

*“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).*

*23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”*

103. The opponent submits that the earlier EU trade mark has become highly distinctive through use. The applicant accepts that the earlier mark is not descriptive

of the goods and services at issue. However, it disputes that the mark has become highly distinctive through use.

104. I find that PEANUTS is inherently distinctive to a 'normal' or medium degree in relation to *computer software* and *entertainment* services.

105. For the reasons given in paragraphs 37 – 41 above, I find that despite some evidence of use of the trade mark in relation to mobile software applications proving games and/or amusement, the opponent's evidence does not establish that the earlier mark has become highly distinctive for any *computer software*. The most relevant point for current purposes is that there is no evidence of any use of the earlier mark in relation to software for use with *social introduction and networking services*, *babysitting* services, or for use with any of the other services covered by the application. Consequently, there is no question of the earlier mark having become highly distinctive through use in relation to the kinds of software I have found to be complementary to some of the services covered by the application.

106. At the hearing, the opponent argued that the earlier mark had become highly distinctive for *entertainment* services. As I understood it, this was based on the use of PEANUTS in relation to mobile software application for games and amusement and/or the 2015 film entitled 'Snoopy and Charlie Brown: A Peanuts Movie'. I have already explained why I do not consider that such use of PEANUTS resulted in the earlier trade mark becoming highly distinctive for *computer software* or *films*. Further, as the applicant pointed out at the hearing, mobile apps and films are goods, not *entertainment* services. There is no evidence of any use of PEANUTS in relation to *entertainment* services.

Comparison of the marks

107. For the reasons given in paragraphs 62 and 63 above, I find that the marks are highly similar.

Likelihood of confusion

108. As I have already explained, the earlier mark is entitled to protection under s.5(2) of the Act in relation to all kinds of computer software, including mobile software applications of the kind used to access some of the services covered by the application.

109. The earlier mark is inherently distinctive to a normal degree in relation to such software.

110. *Social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services*” are similar to *computer software* (i.e. downloadable mobile software applications) to a medium degree.

111. The respective trade marks are highly similar, including highly visually similar, which the parties agree is of most relevance to the selection of the applicant’s services.

112. In these circumstances, I find that there is a likelihood of confusion if the contested mark is used in relation to:

“Social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services.”

- and the earlier trade mark is used in relation to computer software for accessing the above services via the internet.

113. I bear in mind that the average consumer rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he or she has kept in his mind. Taking this into account, I find that there is a

likelihood that the public will believe that the PEANUTS/PEANUT marks are used by the same undertaking, or by related undertakings, in relation to complementary goods and services. The s.5(2) ground of opposition therefore succeeds in relation to the services set out in paragraph 112.

114. If I am right in finding that *computer software* is dissimilar to “*providing information in the field of personal development, namely self-improvement, self-fulfillment, charitable, philanthropic, volunteer, public and community services, and humanitarian activities; babysitting services; information, advisory and consultancy services relating to all the aforesaid*”, then it follows that the opposition under s.5(2) fails in relation to these services. This is because some similarity between the respective goods/services is an essential pre-condition for the application of this provision.

115. However, even if there is a low degree of similarity between these goods/services, I would still have rejected the s.5(2) ground of opposition. The applicant reminded me that a high degree of similarity between the marks can offset a lesser degree of similarity between the goods/services. This does not mean that where the marks are highly similar any similarity between the goods/services will automatically lead to a likelihood of confusion. I find the degree of similarity between the goods/services (if there is any) is so low that there is no likelihood of direct or indirect confusion. My finding that the goods/services have not been shown to be complementary in the sense described in the case-law is key to this. My finding that the earlier mark is not highly distinctive in relation to *computer software*, and that the public take a high degree of care when selecting *babysitting* services are also relevant, albeit secondary, factors.

116. The opposition under s.5(2) therefore fails in relation to the registration of the contested mark in relation to the services set out in paragraph 114.

Overall result

117. The grounds of opposition under ss.5(3) and 5(4)(a) have failed.

118. The ground of opposition under s.5(2) has succeeded in relation to *social introduction and networking services; online social networking services; online social networking services accessible by means of downloadable mobile applications; personal introduction services by computer; Internet based personal introduction services.*

119. The opposition has failed in relation to *providing information in the field of personal development, namely self-improvement, self-fulfillment, charitable, philanthropic, volunteer, public and community services, and humanitarian activities; babysitting services; information, advisory and consultancy services relating to all the aforesaid.*

120. The application is therefore refused in relation to the services in class 45 set out in paragraph 118. The contested trade mark will be registered in relation to the services in class 45 set out in paragraph 119.

121. The application has been withdrawn in respect of the goods/services in all other classes.

Costs

122. The opponent requests off-scale costs because of the applicant's last-minute restriction of the goods/services covered by the application resulted in it having to substantially revise the skeleton argument it was working on at the time.

123. The applicant counters that both parties are guilty of putting forward their best case only shortly before (or at) the hearing. In this connection, the applicant points to the very wide range of goods/services covered by the earlier mark that the opponent initially claimed were similar to all the published goods/services of the application. The applicant also points to the marked contrast between the wide range of goods/services for which the opponent initially claimed that the earlier trade mark had a reputation/goodwill at the relevant date, and the much shorter list relied on at the hearing.

124. The registrar has a wide discretion to award costs: see Rule 67 of the Trade Mark Rules 2008. In *ALLORO TM*²⁹ Mr Daniel Alexander QC, as the Appointed Person, summarised the correct approach as follows:

“16. The decision maker is..... entitled to take into account a wide range of factors in considering the costs to be awarded and whether they should be off-scale.

17. These include the conduct of the parties, the nature of the case and whether it is self-evidently without merit, whether there have been abuses of procedure, the extent to which offers made to settle the case were unreasonably rejected and could have resulted in costs being avoided. There is no rigid formula, although the paradigm case for off-scale costs will involve breaches of rules, delaying tactics or unreasonable behaviour. Reasonable people can differ as to how unreasonable behaviour must be before it is appropriate to depart from the usual scale of costs.”

125. I have taken into account that:

- (i) The necessary particularisation of the opponent’s case occurred just prior to the hearing;
- (ii) The applicant’s last-minute decision to restrict its application to services in class 45 resulted in the applicant having to urgently re-focus its case, and this wasted time spent preparing to present the opposition against a wider range of goods/services;
- (iii) The restriction of the application probably shortened the time spent at the hearing itself.

²⁹ BL O-116-13

126. In my view, individual aspects of both side's behaviour can be regarded as unreasonable. However, I do not consider that either side has acted so unreasonably that the other side is entitled to off-scale costs. I will, therefore, award costs on-scale.

127. Both parties have achieved a measure of success so far as the contested services in class 45 are concerned. The opposition is likely to have succeeded to a larger extent if it were not for the applicant's last-minute restriction of its application to class 45.

128. The opponent is, therefore, to be treated as having been more successful than the applicant. Consequently, it is entitled to an award of costs. I assess these as follows:

- (i) £200 for preparing a statement of case;
- (ii) £200 for the official fee;
- (iii) £500 for preparing evidence and considering the applicant's evidence;
- (iv) £800 for preparing for the hearing and preparing a skeleton argument.

129. I therefore order Peanut App Limited to pay Peanuts Worldwide LLC the sum of £1700. This to be paid within 2 months of the date of this decision.

Dated this 16th day of June 2020

Allan James
For the Registrar

Annex A

Class 3

Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices; non-medicated toiletries; creams and lotions for hand, body and face; baby powders, face powders; shampoo and conditioner; hair preparations; fragrances, lip gloss, lip balm, nail polish, mouthwash; air fragrancing preparations, bubble bath; bath and shower gels; all-purpose cotton swabs for personal use; pet shampoo and pet conditioner.

Class 4

Candles and wicks for lighting.

Class 6

Small items of metal hardware; safes; goods of common metal not included in other classes; metal key chains; nameplates of metal; metal novelty license plates; tackle boxes of metal.

Class 8

Hand tools and implements (hand-operated); cutlery; razors; kitchen accessories, namely, cooking forks, spatulas, and slotted spoons; flatware; hand garden tools, namely, pruning shears, pruners, trowels, weeding forks, spades, hoes, transplanters, rakes and cultivators; electric pet clippers; electric razors and electric hair clippers, shaving cases, pedicure sets, manicure sets, can openers, nutcrackers.

Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signaling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; motion picture films featuring adult's and children's entertainment; downloadable motion pictures and television shows featuring adult's and children's entertainment; downloadable music, ringtones and electronic games via the Internet and wireless devices; eyeglasses, sunglasses and accessories therefor, namely, straps, neck cord and cases; pre-recorded DVDs and CDs featuring adult's and children's entertainment; mobile phone cases, mobile device cases, computer skins, covers and cases, headphones, ear buds, mobile phone charms, mobile phone lanyards, mobile phone and computer wall papers and screen savers, computer games

software for use on computers, mobile phones and cellular phones; downloadable computer software; computer game software; video game software, video game cartridges and video game discs; magnets and decorative magnets; cameras; snorkels; mouse pads; telephone cards (magnetically encoded); bicycle helmets; calculators; camera cases; electronic timers.

Class 10

Surgical, medical, dental and veterinary apparatus and instruments; baby bottles; baby bottle nipples; pacifiers, pacifier clips; medical wearing apparel, namely, scrub tops and scrub pants; teething rings.

Class 11

Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; electric lamps and lighting fixtures; electric lights for Christmas trees; electric night lights; flashlights; night lights; humidifiers; kettles.

Class 12

Vehicles; Apparatus for locomotion by land, air or water; auto accessories, namely, seat belt covers, seat covers, wheel covers, sun shades, hand break covers, steering wheel covers, stick shift covers, headrests for vehicle seats, upholstery for vehicles, rearview mirror covers, automobile beverage holders; baby carriages; bicycles; bicycle accessories, namely, seats, seat covers, and training wheels; tricycles; novelty license plate frames; car seats for pets, car seats for children.

Class 14

Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; Jewellery, precious stones; Horological and chronometric instruments; watches; clocks; medals; jewelry boxes.

Class 15

Musical instruments; musical instrument cases, carrying bags and storage bags; musical performance accessories, namely, sheet music stands and musical instrument stands; tuning forks, tuners for musical instruments.

Class 16

Paper, cardboard and goods made from these materials, not included in other classes; printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks; posters, lithographs and prints; book ends, pencil cups, pens, pencils, erasers, desk blotters, dry erase boards, dry erase markers, memo boards,

blank checks, checkbook cases, invitations, temporary tattoos, comic strips, comic books, rubber stamps, crayons, highlighting markers, markers, note books, note pads, note cards, memo pads, stationery, adhesive note pads, adhesive tape dispensers, adhesive tapes for stationery purposes, rubber bands, paper clips, loose-leaf paper, file folders, photo albums, diaries, address books, guest books, telephone number books, journals, scrap books, three-ring binders, decals, wall decals, stickers, wall stickers, bumper stickers, calendars, iron-on heat transfers, paper gift tags, paper gift bags, paper shopping bags, paper lunch bags, paper napkins, paper guest towels, banners of paper, bookmarks, patterns for sewing, gift wrap paper, greeting cards, books featuring cartoon characters, coloring books, construction paper, growth charts made of paper, name tags, glue sticks for household use, paper napkins, pencil boxes, pencil cases, rulers, place cards, writing tablets, book covers, holiday decorations made of paper, postcards, lunch bags of textile, facial tissue, toilet paper, bibs of paper, telephone calling cards not magnetically encoded; artists' materials, namely, stencils, paper and paint brushes; rulers.

Class 17

Duct tape.

Class 18

Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas and parasols; walking sticks; whips, harness and saddlery; luggage; bags, namely all-purpose athletic bags, backpacks, beach bags, book bags, school bags, diaper bags, duffel bags, gym bags, shopping bags, overnight bags, school bags, shoulder bags, tote bags, travel bags and garment bags for travel; purses; wristlet bags; wristlet handbags; wallets; business card cases; baby carriers (bags); leather key chains; cosmetic cases sold empty; canes; pet clothing; pet accessories, namely, leashes, carriers (bags).

Class 20

Furniture, mirrors, picture frames; goods (not included in other classes) of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; pillows; mattresses; nameplates not of metal; hand fans; plastic cake decorations; tables; chairs; desks; dressers; beds; highchairs; cribs; bassinets; moses baskets; cradles; playpens; baby bouncers; baby walkers; toy chests; storage units; coat racks; diaper caddies; non-metal boxes; synthetic resin figurines; resin figurines plastic sculptures; plaster sculptures; plastic novelty license plates; sleeping bags; picture frames; sleeping bags, inflatable pillows; mirrors, closet dividers, namely, annular plates that fit over a closet rod to separate clothes; beds for pets; step stools; clothing and hat hooks; hangers for clothing; non-metal tool boxes; mattress pads.

Class 21

Household or kitchen utensils and containers of plastic, melamine, porcelain or glass; combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steel wool; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes; mugs; baskets; cookie jars; trivets; plastic and stoneware banks; porcelain banks; pet dishes; aluminum cake pans and cake decorating sets; plastic storage containers for household and domestic use; fabric storage caddies, fabric storage boxes; napkin rings; dinnerware; serving ware; candy dishes; salt and pepper shakers; serving trays; pitchers; decanters; pails; vases; candle holders; bathroom accessories, namely, bath sponges, waste baskets, cups, cup holders, toothbrushes, toothbrush holders, toilet paper holders, lotion pumps, soap holders, liquid soap pumps, tissue boxes; ice buckets; coasters; porcelain commemorative plates; bath sponges; combs; hair brushes; bowls; candy containers; cups; drinking glasses; drinking straws; jugs; keepsake containers; household utensils, namely, graters, sieves, spatulas, strainers, kitchen tongs; lunch boxes; insulated lunch bags; mug lids; disposable dinnerware, namely, plates, dishes and bowls; vacuum bottles; portable coolers; gloves for household purposes; laundry basket for domestic or household use; oven mitts, hot pads.

Class 24

Textiles and textile goods, not included in other classes; bed covers; table covers; bed linen, bed blankets, bed covers, bed canopies, comforters, duvet covers, pillow shams, pillow cases, sheets, bed skirts, quilts, throws, bed spreads, dust ruffles, fabric valances, draperies, curtains, room divider curtains; towels; bath linen, towels, hand wash cloths; textile garden flags; banners of cloth; textile and vinyl placemats; tablecloths not of paper, textile fabric table runners; textile napkins; textile wall hangings; unfitted fabric furniture covers; shower curtains; burp cloths; growth charts of textile.

Class 25

Clothing, footwear, headgear; jeans, shirts, tops, jackets, coats, raincoats, sweaters, vests, pants, sweatpants, sweatshirts with hoods, sweatshirts, jumpsuits, shorts, overalls, short-alls, dresses, skirts, bottoms, lingerie, swimwear, underwear, socks, gloves, mittens, ear muffs, pajamas, loungewear, tights, leggings, leg warmers, athletic uniforms, cheerleading uniforms, replica sports jerseys, active wear, swimwear, infant wear, neckties, belts, suspenders, cloth bibs, bibs made of plastic; Halloween costumes; uniforms worn by medical personnel; shoes, boots, sandals, slippers; belts; hats, caps, headbands, scarves, bandanas.

Class 26

Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; shoe strings; hair ribbons, hair ornaments, barrettes, pony tail and hair clip holders, hair pins; ornamental novelty buttons, badges and pins; shoe lace fasteners; shoe buckles; hair bands; hair ornaments; fabric appliqués.

Class 27

Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile); wall coverings; wallpaper.

Class 28

Games and playthings; gymnastic and sporting articles not included in other classes; decorations and ornaments for Christmas trees; children's multi-activity toys, plush toys, jigsaw puzzles, manipulative puzzles, dolls, board games, card games, playing cards, balloons; roller skates, inline skates, ice skates; molded toy figurines, bobble head dolls, wind-up toys; action figures; mechanical toys; toy musical instruments, toy music boxes, and toy mobiles; water globes, toy Christmas trees; Christmas stockings; hobby craft kits, namely, sewing kits, paint kits, jewelry making kits, arts and craft kits, model kits, latch-hook rug kits, needlepoint kits; arcade game machines; pet toys; crib mobiles, baby multiple activity toys, rattles, infant rattles incorporating teething rings, bath toys; inflatable swimming pools and inflatable inner tubes for aquatic recreational use; sporting goods, namely, baseballs, basketballs, soccer balls, footballs, tennis balls, baseball bats, baseball gloves, archery sets; skateboards; snow boards; toy figures for hanging from a rear mirror; playing cards.

Class 32

Mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages; bottled water, fruit drinks, fruit juices, mineral waters, aerated waters; flavored water; vegetable juices; non-alcoholic drinks and syrups and preparations for making such drinks.

Class 35

Advertising; business management; business administration; office functions; retail store, online and mail order services featuring clothing and accessories, personal care products, cooking utensils, consumer electronics, jewelry, paper products, office supplies, greeting cards, luggage and small leather goods, furniture, housewares, and beverages.

Class 41

Education; providing of training; entertainment; sporting and cultural activities; amusement park services; continuing animated programs distributed over television, satellite, audio, video media, the Internet and worldwide web; entertainment in the nature of live stage performances plays and musical plays; providing online publications (not downloadable); providing computer games (software) via a computer network; providing indoor and outdoor recreation centers and playground facilities.